IN THE COMMONWEALTH COURT OF PENNSYLVANIA

US Airways Group, Inc. and AIG Claims Services,	:	
Petitioners	:	
v.	:	No. 1729 C.D. 2009
Workers' Compensation Appeal Board (Confer),	:	Submitted: April 30, 2010
Respondent	:	

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE COHN JUBELIRER **FILED: August 23, 2010**

US Airways Group, Inc. (US Airways) and its insurer AIG Claims Services (together, Employer) petition for review of an order of the Workers' Compensation Appeal Board (Board) that affirmed a Workers' Compensation Judge's decision granting Terry Confer's (Claimant) Claim Petition. On appeal, Employer argues that the WCJ erred by: (1) making a factual finding that Claimant sustained a work-related injury in the nature of asthma; (2) capriciously disregarding evidence regarding the extent, nature, and severity of Claimant's exposure to fallen debris from a vent; (3) failing to suspend benefits based on evidence which established that there

was no ongoing disability from the exposure; (4) awarding unreasonable contest fees; and (5) shifting the burden of proof to Employer to show job availability in the context of a claim petition.

Claimant filed the Claim Petition against Employer alleging that he sustained a work-related injury on August 14, 2007, when he "was pelted with metal and fliber [sic] glass shavings and other debris both on take off and prior to landing." (Claim Petition ¶ 4, R.R. at 1a.) Claimant described his injury as "eyes, nose, skin and lung irritation, difficulty breathing." (Claim Petition ¶ 1, R.R. at 1a.) Claimant sought ongoing benefits from August 15, 2007. Employer issued a Notice of Workers' Compensation Denial indicating that Claimant did not suffer a work-related injury. The case was then assigned to a WCJ.

In support of the Claim Petition, Claimant provided the following testimony. Claimant had been a flight attendant for US Airways for nearly ten years. On August 14, 2007, while working a flight from Shannon, Ireland, to Philadelphia, Pennsylvania, Claimant and a fellow flight attendant, Donald Delprato (Delprato), were injured. Claimant and Delprato were seated next to each other when debris from an overhead vent came down and covered them. Claimant immediately called the captain of the airplane, who turned the airplane around and landed in Ireland twenty minutes later. After the airplane landed, Claimant and Delprato exited the airplane and attempted to find a place to shower to wash off the debris before re-boarding, but to no avail. During the five-to-six-hour delay, Claimant used a lavatory and hot towels to wash the debris from his person. He removed his shirt to shake off the debris, but an oily substance from the debris could not be removed from his

clothing. A short time after Claimant was exposed to the debris, he developed a rash on his arms, head, nose and face. On the return flight to Philadelphia, Claimant had difficulty breathing and was coughing. Approximately twenty minutes before landing in Philadelphia, the debris came out of the overhead vents again covering Claimant and Delprato. Claimant gathered some of the debris that fell on them and gave it to a US Airways mechanic after the flight landed in Philadelphia. Claimant was treated by a US Airways physician the next day, at which time he continued to exhibit a rash, coughing, and tightness in his chest. Claimant continued treating with the US Airways physician for four more weeks before he was forced to treat with other physicians because Employer denied his claim. Claimant was hospitalized at Vanderbilt Hospital for severe dehydration and diarrhea, and lost approximately 30 pounds in one month following the incident. Claimant's current symptoms consist of: numbness in his hands, feet and face; balance issues; cramps in his hands and legs; blurred vision; diarrhea; memory issues; weight loss; hoarseness; headaches; mental slowness; and fatigue. Claimant has not worked since August 14, 2007, and does not believe he can return to work.

Delprato's testimony from his own claim in the companion case of U.S. Airways Group, Inc. v. Workers' Compensation Appeal Board (Delprato), No. 1730 C.D. 2009 (Pa. Cmwlth. filed August 23, 2010), was made part of the evidentiary record in the case at bar, and is consistent with Claimant's testimony. Delprato described the debris that fell on him and Claimant as small metal shavings, paper, fuzz, hair, dust, white powder and an oily substance. Delprato experienced similar symptoms as Claimant on the return flight to Philadelphia and presently experiences symptoms which include, "headaches, tingling and burning around his eyes,

difficulties with his voice, tightness and pain in his chest, coughing, shortness of breath, tingling in his toes and hands, diarrhea, sharp stabbing pain throughout his body, memory issues, generalized mental slowness, coordination issues, and tremors." (WCJ Decision, Findings of Fact (FOF) ¶ 2i.) Like Claimant, Delprato believes he cannot return to his job because of his tremors, headaches, and coughing.

In further support of the Claim Petition, Claimant submitted the deposition testimony of Murray Sachs, M.D., who is board certified in internal medicine with his practice consisting of both internal medicine and pulmonary disease. Dr. Sachs testified that he examined Claimant on March 3, 2008, at which time Claimant complained of difficulty breathing, coughing, wheezing, heaviness in his chest, diarrhea, loss of energy and weight, and hoarseness. Claimant also explained the incident that occurred on August 14, 2007. Dr. Sachs explained that Claimant's examination was normal except that Claimant had been wheezing with forced expiratory testing. Dr. Sachs reviewed Claimant's medical records, which included chest x-rays, pulmonary function studies and methacholine studies performed in 2006 and 2007. The 2006 study revealed reflux disease causing a cough. However, the 2007 study, which was performed after the work incident, exhibited a positive result for inducible airway obstruction that reversed after use of a bronchodilator. Dr. Sachs opined that Claimant had "*industrial bronchitis* as a result of the inhalation of the debris on August 14, 2007." (FOF ¶ 7d (emphasis added).) Dr. Sachs recommended that Claimant continue taking Prilosec, Flovent, and Xopenex. He further expressed an opinion that Claimant was not capable of returning to his pre-

injury job because "odors and changes in weather induce coughing and wheezing. Jet fuel in particular triggers this problem for Claimant." (FOF ¶ 7d.)[1]

In opposition to the Claim Petition, Employer submitted the deposition testimony of Daniel C. DuPont, D.O., who is board certified in pulmonary and internal medicine. Dr. DuPont testified that he examined Claimant on March 18, 2008, at which time Claimant provided a past medical history of high blood pressure, high cholesterol, and gastroesophageal reflux. Claimant complained that, after the August 14, 2007 work incident, he had symptoms including: rash; breathing difficulties; balance issues; runny eyes; some visual impairment; memory issues; coughing; wheezing; difficulty tolerating changes in temperature, humidity and odors; diarrhea; extreme fatigue; lack of appetite; weight loss; and listlessness. Dr. DuPont testified that Claimant weighed 210 pounds and that Claimant weighed 220 pounds shortly after the US Airway physician examined Claimant after the incident. Although Dr. DuPont did not find a rash on Claimant's skin, he did note that there was redness in the back of Claimant's throat and that Claimant had expiratory wheezing. Dr. DuPont reviewed Claimant's medical records and noted that the 2006 methacholine study revealed that Claimant did not have asthma or reactive airways because his cough, at that time, was due to a runny nose or reflux. However, Dr. DuPont admitted that the methacholine study performed in 2007 "revealed stage 5 which is the highest stage and was a positive finding for reactive airways." (FOF ¶ 13h.) Accordingly, "Dr. DuPont opined that Claimant had reactive airways[, or

[1] Claimant also submitted the deposition testimony of Fred Estrella, an In-flight Services Supervisor for US Airways, and Claire Paterra, a flight attendant for US Airways. However, since their deposition testimony is neither specifically called into question in this appeal, nor is it dispositive of the issues, their testimony will not be discussed.

asthma,] and that the new onset was due to the August 14, 2007 exposure . . . [and] Claimant could return to his pre-injury job but would have some limitations. Claimant's restrictions included avoiding exposure to secondhand smoke, extremes of temperature and humidity, and odor triggers." (FOF ¶ 13i.)

Claimant submitted deposition testimony to rebut the testimony of Dr. DuPont on August 18, 2008. Claimant testified that, prior to the work incident of August 14, 2007, he was treated for a reflux-related cough. Claimant explained that "[t]he cough was nothing like the cough he experienced after August 14, 2007 because since August 14, 2007 he feels like he cannot breathe, whereas the reflux caused irritation and indigestion." (FOF ¶ 11b.) Claimant takes Prilosec, which has relieved the reflux-related cough. Claimant explained that he flew on an airplane from Denver to Philadelphia to see Dr. DuPont and had to use his inhalers to attempt to control his breathing problems. Notwithstanding Dr. DuPont's opinion, Claimant continues to believe that he cannot return to work because he will be subjected to certain odors, humidity levels, changes in altitude and climates, jet fuel, and smoke, which exacerbate his symptoms.

After considering all the evidence of record, the WCJ found the testimony of Claimant and Delprato credible and persuasive and accepted their testimony as fact. The WCJ also found the testimony of Dr. Sachs to be more credible and persuasive than the testimony of Dr. DuPont. The WCJ explained that there were significant factors in making this determination, including:

a. Dr. Sachs and Dr. DuPont agreed that Claimant sustained a work related asthmatic condition.

b. Dr. DuPont acknowledged that Claimant would have limitations if he returned to work.
c. There was no explanation given as to how Claimant could work within his limitations as a flight attendant and this Judge finds it hard to believe that Claimant would be able to avoid odors that would trigger his work related problems.
d. The diagnostic studies corroborate the work related diagnosis.
e. Claimant's testimony was credible with regard to how he had difficulty flying as a passenger since his work injury and corroborates Dr. Sachs' opinion that Claimant is disabled from his pre-injury job.

(FOF ¶ 19a-e.) The WCJ found as fact that "Claimant sustained a work related injury on August 14, 2007 in the nature of restrictive airways or asthma and is totally disabled as of August 14, 2007." (FOF ¶ 20.) The WCJ also determined that "Employer failed to present a reasonable contest [because] Dr. DuPont agreed that Claimant sustained a work related injury, agreed as to the nature of the injury, and opined that Claimant had some limitations as a result of the injury. Employer presented no evidence as to how Claimant's limitations would be accommodated if he returned to work as a flight attendant." (FOF ¶ 21.) As such, the WCJ awarded Claimant unreasonable contest attorney fees in the amount of $8,620.00. Employer appealed to the Board, which affirmed the WCJ's decision granting Claimant's Claim Petition. Employer now petitions this Court for review.[2]

On appeal, Employer first argues that the WCJ erred in finding and concluding that Claimant was totally disabled due to asthma. (See FOF ¶ 20; WCJ Decision, Conclusions of Law (COL) ¶ 2.) Employer contends that the evidence does not

[2] "Our review is limited to determining whether an error of law was committed, whether necessary findings of fact are supported by substantial evidence and whether constitutional rights were violated." Scott v. Workers' Compensation Appeal Board (Ames True Temper, Inc.), 957 A.2d 800, 803 n.3 (Pa. Cmwlth. 2008).

support this finding and conclusion because Dr. Sachs, who was found credible, testified that Claimant suffered from disabling "industrial bronchitis," not asthma. In opposition, Claimant contends that "industrial bronchitis is in fact the same thing as industrial asthma" because Claimant's counsel used the terms asthma and bronchitis interchangeably in the companion case of Delprato. (Claimant's Br. at 11 & n.1.) Claimant also argues that "there was essentially no difference between the opinions of the respective witnesses." (Claimant's Br. at 14.)

In a claim petition proceeding, the claimant bears the burden of proving all elements necessary to support a WCJ's award of compensation. Rite Aid Corp. v. Workers' Compensation Appeal Board (Bennett), 709 A.2d 447, 449 (Pa. Cmwlth. 1998). Thus, where a claimant seeks ongoing benefits, he bears the burden of proving that he suffered an injury while in the course of his employment and that he remains disabled due to that injury. Scott v. Workers' Compensation Appeal Board (Ames True Temper, Inc.), 957 A.2d 800, 804 (Pa. Cmwlth. 2008).

In this case, Claimant presented the testimony of Dr. Sachs, who credibly testified that Claimant suffered an injury in the form of "*industrial bronchitis* as a result of the exposure to the substances that he inhaled when the filter blew out on the airplane on two separate occasions." (Sachs Dep. at 20-21, R.R. at 158a-59a (emphasis added).) Dr. Sachs further opined that Claimant is totally disabled from performing his job as a flight attendant because "his cough and wheezing is precipitated by various odors [and] changes in the weather." (Sachs Dep. at 21, R.R. at 159a.) Dr. DuPont, on the other hand, testified that Claimant suffered an injury in the form of *reactive airways or asthma* from the exposure to the fallen vent particles.

(DuPont Dep. at 18-19, R.R. at 257a.) However, the WCJ specifically found "the testimony of Dr. Sachs more credible and persuasive than the testimony of Dr. DuPont [and accepted the testimony of Dr. Sachs] as fact over that of Dr. DuPont wherever the two differ." (FOF ¶ 19.) Notwithstanding this factual finding and credibility determination, the WCJ later made an inconsistent finding and conclusion that "Claimant sustained a work related injury on August 14, 2007 in the nature of *restrictive airways or asthma* and is totally disabled as of August 14, 2007." (FOF ¶ 20 (emphasis added); see also COL ¶ 2.) Although Employer correctly points out the inconsistency in the WCJ's findings and conclusions as to the *diagnosis* of Claimant's injury, it is clear from the WCJ's decision that she clearly credits the medical opinion and diagnosis provided by Dr. Sachs (industrial bronchitis) over that of Dr. DuPont (asthma). (See FOF ¶ 19.) As such we conclude that, based on the credible testimony of Dr. Sachs, Claimant suffered a work-related injury related to coughing and wheezing, for which he is totally disabled. Accordingly, we correct the WCJ's decision to reflect a diagnosis of Claimant's injury in the nature of "industrial bronchitis" as presented by the credible testimony of Dr. Sachs.

Next, Employer argues that the WCJ capriciously disregarded evidence of record as to the extent, nature, and severity of the alleged exposure to the fallen vent particles. Specifically, Employer contends that Claimant produced no medical evidence that the exposure caused his condition and that Dr. DuPont testified that there were no specific toxins found in Claimant's toxicology report. (DuPont Dep. at 13, R.R. at 255a.) Further, Employer cites to Dr. Sachs' testimony stating that Claimant's chest x-rays and pulmonary studies were normal and that Claimant had a clear to quiet respiration on physical exam.

As a part of his burden, the claimant must establish a causal connection between the disability and the work-related incident. Scott, 957 A.2d at 804. What is required to establish this causal connection is dependent upon whether or not the injury is obviously work related. An example of an obvious injury is one that immediately manifests while a claimant is in the act of doing the kind of work which can cause such an injury. Calcara v. Workers' Compensation Appeal Board (St. Joseph Hospital), 706 A.2d 1286, 1289 (Pa. Cmwlth. 1998). This Court, in Calcara, set forth a classic example of an obvious work-related injury as a laborer who grabs his back in pain after lifting a shovel full of wet concrete. Id. In such a case, the causal connection is so clear that a lay person can see the connection. Id. Under such circumstances, the claimant's testimony is sufficient to connect the injury to the claimant's employment, and additional medical testimony is not required. Id. Conversely, where there is no obvious causal connection between an injury and the claimant's employment, the claimant must establish that connection by unequivocal medical testimony. Lewis v. Commonwealth, 508 Pa. 360, 365, 498 A.2d 800, 802 (1985). Whether medical testimony is unequivocal is a conclusion of law, fully reviewable by this Court; to make this determination, we must examine the testimony as a whole, recognizing that a final decision should not rest on a few words taken out of context. "[I]t is not absolutely essential that the expert say 'that it is my professional opinion' and it is sufficient for the expert to say 'I think' or 'I believe' as the assertion of his opinion." Philadelphia College of Osteopathic Medicine v. Workmen's Compensation Appeal Board (Lucas), 465 A.2d 132, 134 (Pa. Cmwlth. 1983). A claimant attempting to prove a non-obvious connection between his work and an injury *has* produced competent evidence of the connection even if his medical

witness admits to uncertainty, reservation, doubt or lack of information with respect to medical and scientific details. Id. at 135.

Here, the record indicates that both Claimant and Employer had access to samples of the fallen vent debris, which were compiled and sent away for testing. However, the record is devoid of any test results submitted by the parties. (See Sachs Dep. at 40-41, R.R. at 163a-64a.) Dr. Sachs testified on cross-examination that he had "no idea what these chemicals were" (Sachs Dep. at 42, R.R. at 164a) in the debris that Claimant inhaled, but nonetheless credibly opined that the exposure to this debris caused Claimant's disabiling injury in the form of "industrial bronchitis." (Sachs Dep. at 20-21, R.R. at 158a-59a.) Dr. Sachs' opinion was based on the fact that Claimant's physical exam exhibited forced expiratory wheezing, which he explained as an "objective" finding. (Sachs Dep. at 35, R.R. at 162a.) Further, Dr. Sachs relied on the 2007 methacholine test, which was conducted after the work incident that had a positive result "at level five with inducible airway obstruction and then reversed after bronchodilator administration." (Sachs Dep. at 19, R.R. at 158a.) Accordingly, pursuant to Lucas, Dr. Sachs' credible testimony was competent evidence to prove a non-obvious causal connection between the work injury and disability. Moreover, it is important to note that although Dr. DuPont testified that Claimant's medical records indicated that a toxicology report was negative for tricresyl phosphates, Dr. DuPont nonetheless opined that "I thought that he had reactive airways and that it seems like he had a new onset of this after having the exposure." (DuPont Dep. at 13, 18, R.R. at 255a, 257a.) As such, the testimony of both experts establishes that Claimant's exposure to the fallen vent debris at work on

August 14, 2007 caused his coughing and wheezing, which Dr. Sachs credibly diagnosed as "industrial bronchitis."

Additionally, Employer argues that the WCJ capriciously disregarded the photographic evidence depicting the area where Claimant was seated because passengers who were also in direct and close proximity to the released material did not voice complaints. This argument has no merit. The WCJ specifically noted the photographic evidence in Finding of Fact 12, but did not find this evidence compelling because Claimant's credible evidence corroborated the location of Claimant's seat in relation to the air vents. (FOF ¶ 12.) The WCJ chose to place little, if any, weight on this evidence, which is solely in her discretion. Hoffmaster v. Workers' Compensation Appeal Board (Senco Products, Inc.), 721 A.2d 1152, 1156 (Pa. Cmwlth. 1998). Our role as an appellate court is not to reweigh the evidence or to review the credibility of the witnesses. Bethenergy Mines, Inc. v. Workmen's Compensation Appeal Board (Skirpan), 531 Pa. 287, 291, 612 A.2d 434, 436 (1992). Rather, the reviewing court must simply determine whether, upon consideration of the evidence as a whole, the WCJ's findings have the requisite measure of support in the record. Id. Moreover, we agree with the Board's opinion that "[t]he fact that no passengers were dusty or suffering after the flight does not detract from the fact that Claimant was observed to be covered in dust." (Board Op. at 4.) As such, we dismiss Employer's argument that the WCJ capriciously disregarded photographic evidence.

Next, Employer argues that the WCJ erred by failing to suspend benefits based on evidence which established that there was no ongoing disability from the

exposure. Specifically, Employer argues that the WCJ's statement that she found it "hard to believe that Claimant would be able to avoid odors that would trigger his work related problems," (FOF ¶ 19c,) was not supported by substantial, competent evidence of record and, instead, was based on the WCJ's own "perceptions and opinions." (Employer's Br. at 16.) We disagree. Finding of Fact 19c is supported by the credible testimony of Dr. Sachs. Dr. Sachs provided his medical opinion that:

> [Claimant] is not capable of performing the job of flight attendant [because] the big problem is that his cough and wheezing is precipitated by various odors, changes in the weather, and among the odors he specifically said perfume. Now, it's hard to get on an airplane where ladies are present that there is no perfume in the area, and it's even harder to get on an airplane when there's no jet fuel in the environment. [Claimant] said that he smells jet fuel, which never bothered him before, but particularly when the engines start up and when the plane is taxiing, that's when the jet fuel smell is most prominent to him.

(Sachs Dep. at 21-22, R.R. at 159a.) Dr. Sachs also testified that Claimant had some respiratory issues when he flew to Pittsburgh to see Dr. Sachs because the smell of jet fuel triggered his symptoms of coughing, wheezing, and tightness in his chest. (Sachs Dep. at 22, R.R. at 159a.)

Likewise, Employer's reliance on Bethlehem Steel Corporation v. Workmen's Compensation Appeal Board (Baxter), 550 Pa. 658, 708 A.2d 801 (1998), for the proposition that Claimant did not demonstrate that his injury caused an ongoing loss of earning power because Claimant would have had the same restrictions regardless of whether or not he worked for US Airways, is also misplaced. In Bethlehem Steel, our Supreme Court held that where a claimant suffers a work-related aggravation (or flare-up of disabling symptoms) of a non-work-related preexisting condition, he is entitled to disability benefits so long as the symptoms or physical condition caused by

the aggravation prevent his returning to work. However, in that case, the Supreme Court held that the claimant was not entitled to benefits because there was undisputed medical evidence that the claimant had fully recovered from his work-related injury caused by the aggravation of his pre-existing asthmatic condition. Unlike the claimant in Bethlehem Steel, Claimant's injury was caused by a work incident and was not an aggravation of a pre-existing condition. Moreover, unlike the medical evidence presented in Bethlehem Steel, which established that the claimant was fully recovered from the work-related injury, there is no such evidence in this case indicating that Claimant has fully recovered from his industrial bronchitis. As such, Employer's argument that benefits should have been suspended is without merit.

Next, Employer argues that the WCJ erred in awarding unreasonable contest attorney fees when Employer reasonably presented expert medical evidence via Dr. DuPont, which directly contradicted Claimant's alleged injuries. Claimant argues that the WCJ had no choice but to award unreasonable contest fees because Dr. DuPont testified that Claimant suffered from asthma as a result of the exposure to the fallen vent debris, which is the same diagnosis as bronchitis, and that Dr. DuPont opined that Claimant could only return to work with restrictions.

Pursuant to Section 440 of the Workers' Compensation Act (Act), 77 P.S. § 996(a),[3] a claimant who prevails, in whole or in part, is entitled to recover reasonable

[3] Act of June 2, 1915, P.L. 736, added by Section 3 of the Act of February 8, 1972, as amended, 77 P.S. § 996(a). Section 440(a) provides, as follows:

> (a) In any contested case where the insurer has contested liability in whole or in part, including contested cases involving petitions to terminate, reinstate, increase, reduce or otherwise modify compensation awards, agreements or other payment

(Continued…)

attorney fees from the employer unless the employer has satisfied its burden of showing a reasonable basis for the contest. McGuire v. Workmen's Compensation Appeal Board (H.B. Deviney Co.), 591 A.2d 372, 374 (Pa. Cmwlth. 1991). A reasonable contest exists when medical evidence is conflicting or is susceptible to contrary inferences and there is no evidence that the employer's contest was frivolous. County of Delaware v. Workmen's Compensation Appeal Board (Thomas), 649 A.2d 491, 496 (Pa. Cmwlth. 1994). Moreover, "[a]n issue of credibility is a legitimate and reasonable subject of inquiry and challenge." Cleaver v. Workmen's Compensation Appeal Board (Robert E. Wiley/Continental Food Service), 456 A.2d 1162, 1164 (Pa. Cmwlth. 1983). The question of whether a contest is reasonable is a question of law fully reviewable by this Court. Thomas, 649 A.2d at 496. An analysis of the law and review of the record in the present case demonstrate that the evidence lends itself to contrary inferences sufficient to establish a reasonable contest.

The WCJ's reasoning for granting unreasonable contest fees to Claimant was based upon her finding that "Dr. DuPont agreed that Claimant sustained a work related injury, agreed as to the nature of the injury, and opined that Claimant had some limitations as a result of the injury." (FOF ¶ 21.) As previously discussed, Dr. Sachs, who was found credible, opined that Claimant suffers from industrial

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> arrangements or to set aside final receipts, the employe or his dependent, as the case may be, in whose favor the matter at issue has been finally determined in whole or in part shall be awarded, in addition to the award for compensation, a reasonable sum for costs incurred for attorney's fee, witnesses, necessary medical examination, and the value of unreimbursed lost time to attend the proceedings: Provided, That cost for attorney fees may be excluded when a reasonable basis for the contest has been established by the employer or the insurer.

77 P.S. § 996(a).

bronchitis as a result of the work incident and cannot return to work for US Airways as a flight attendant. To the contrary, Dr. DuPont testified that Claimant suffers from asthma as a result of the work incident (DuPont Dep. at 18-19, R.R. at 257a), and opined that Claimant could return to work, albeit with limitations. Dr. DuPont explained that Claimant's restrictions were to avoid exposure to secondhand smoke, to extremes in temperature and humidity, and certain odors that cause his symptoms. (DuPont Dep. at 24, R.R. at 258a.) Dr. DuPont further opined that "if [Claimant] was on medications he could certainly do air travel." (DuPont Dep. at 19, R.R. at 257a.) Dr. DuPont testified that he treats others with a similar diagnosis to Claimant and that he does not restrict those patients from flying because:

> [O]ne of the goals of treating asthma is to allow normal activity. So just as I would like them to be able to go to a bus stop in whatever the weather is and get on the bus and take a bus to work and get off the bus, that's a form of public transportation that we strive to allow people to participate in, the same thing would apply to air travel.

(DuPont Dep. at 20, R.R. at 257a.) Moreover, Dr. DuPont testified that Claimant was "doing fine" with regard to his move to Colorado, which at the time he examined Claimant in March, was "still pretty cold and snowy." (DuPont Dep. at 25, R.R. at 258a.) Dr. DuPont also acknowledged that Claimant indicated to him that he was at "his baseline state" with regard to his air travel from Colorado to Pennsylvania when he was examined by Dr. DuPont. (DuPont Dep. at 25-26, R.R. at 258a-59a.) Because there was conflicting evidence presented regarding the nature of the disability, Employer has established a reasonable contest.

It is also noteworthy to point out that although Claimant alleged in his Claim Petition that the injury or illness that he suffers from includes "*eyes, nose, skin and*

lung irritation, difficulty breathing," (Claim Petition ¶ 1, R.R. at 1a (emphasis added)), Claimant did not present any medical evidence to support an injury specifically related to his eyes, nose and skin. Rather, Dr. Sachs provided an opinion related to Claimant's lung irritation and difficulty breathing, which he diagnosed as industrial bronchitis. Thus, by contesting the Claim Petition, Employer effectively limited the extent of the injuries that Claimant initially alleged in his Claim Petition. As such, the record indicates that Employer upheld its burden of showing a reasonable basis for the contest. Therefore, the Board's order upholding the WCJ's grant of unreasonable contest fees to Claimant in the amount of $8,620 is reversed.

Finally, Employer argues that the WCJ erred in shifting the burden of proof to Employer to show job availability in the context of a pending Claim Petition. Employer particularly takes issue with Finding of Fact 21, which states that "Employer presented no evidence as to how Claimant's limitations would be accommodated if he returned to work as a flight attendant." (FOF ¶ 21.) Again, we disagree.

Contrary to Employer's assertion, the WCJ's statement was made in the context of a factual finding regarding whether Employer established a reasonable contest. Finding of fact 21 provides as follows:

> Employer failed to present a reasonable contest as Dr. DuPont agreed that Claimant sustained a work related injury, agreed as to the nature of the injury, and opined that Claimant had some limitations as a result of the injury. Employer presented no evidence as to how Claimant's limitations would be accommodated if he returned to work as a flight attendant. Therefore this Judge awards unreasonable contest attorney fees in the amount of $8620.00.

(FOF ¶ 21.) There is no question that the burden of proof remained with Claimant to prove that he sustained a work-related injury and that his disability continues. Moreover, the WCJ properly concluded that Claimant upheld his burden of proof based on the credible testimony of his medical expert, Dr. Sachs. Thus, the WCJ did not shift the burden to Employer. Instead, this finding only relates to whether Employer met its burden to prove that its contest was reasonable, a burden appropriately placed on Employer.

Accordingly, the Board's decision is affirmed in part, as clarified, and reversed in part, consistent with this opinion.

RENÉE COHN JUBELIRER, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

US Airways Group, Inc. and AIG Claims Services,	:	
Petitioners	:	
v.	:	No. 1729 C.D. 2009
Workers' Compensation Appeal Board (Confer),	:	
Respondent	:	

O R D E R

NOW, August 23, 2010, the order of the Workers' Compensation Appeal Board in the above-captioned matter is hereby affirmed in part as modified, and reversed in part. The Board's order is **affirmed** in so much that it affirmed the WCJ's order granting Claimant's Claim Petition, but clarified to the extent that Claimant's disabling injury is in the nature of industrial bronchitis. The Board's order is **reversed** to the extent that it affirmed the WCJ's order granting Claimant unreasonable contest fees in the amount of $8,620.

RENÉE COHN JUBELIRER, Judge